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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1176 Misc.

CHARLES TERAN, FRANK GARBER, and BENNY NOTO,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division One, is reported in 275 A.C.A. 127 (1969). This opinion is appended as "Appendix 1" to the Petition for Writ of Certiorari.

On August 13, 1969, the Court of Appeal denied petitioners' application for a rehearing.

On October 15, 1969, the California Supreme Court denied petitioners' application for a hearing without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether evidence introduced in a state court proceeding antedating *Lee v. Florida*, 392 U.S. 378 (1968), was inadmissible under the Federal Communications Act, 47 U.S.C. §605, as construed in *Lee*, notwithstanding that *Fuller v. Alaska*, 393 U.S. 80 (1968), makes *Lee* and the Act inapplicable.

2. Whether the search of petitioner Teran's apartment violated the Fourth and Fourteenth Amendments.

STATUTES INVOLVED

The First and Fourteenth Amendments to the United States Constitution.

Federal Communications Act, 47 U.S.C. §605:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of

transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . ."[1]

STATEMENT

Petitioners were indicted and convicted for bookmaking, for conspiring to obtain telephone service by fraud, for conspiring to wiretap illegally, and for conspiring to commit the offense of unlawful use of telephone lines and equipment. Petitioner Teran admitted two prior felonies, bookmaking and conspiracy; petitioner Garber admitted a prior conviction for forgery (CT 145-46, 193).

The judgments of conviction were affirmed by the Court of Appeal on July 25, 1969. The Court of Appeal denied a petition for a rehearing on August 13, 1969. On October 15, 1969, the California Supreme Court denied petitioners' application for a hearing

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[1]Section 605 was amended on June 19, 1968. See Pub.L. 90-351, Title III, §803, 82 Stat. 223.

without opinion. Mr. Justice Douglas granted petitioners an extension of time until February 12, 1970, within which to seek review of the judgment of the Court of Appeal of the State of California. The petition for a writ of certiorari was filed on February 12, 1970.

Petitioners converted their bookmaking establishment into a lucrative cottage industry. Operating from separate residences, together the trio handled weekly some $20,000 in betting action (CT 135). Employing at each location an illicit device commonly known as a "blue box," they greatly reduced their overhead by using free of charge the communication lines of the Pacific Telephone and Telegraph Company.

George Alex, a security agent in the accounting department of the telephone company (RT 167-68), explained the utility's standard practice of running computerized print-outs of telephone circuit activity in order to detect equipment malfunctions (CT 26-27). Print-outs record, within a geographical area, toll free calls to long distance information operators when any abnormality appears (CT 26, 35). Company print-outs from April through November, 1966, reflected 2,020 such calls from telephone number 371-1261 (CT 35). Some of these calls were of unusually long duration (CT 30). Between August and late November 1966, print-outs indicated 40 long distance information calls made from number 377-4275 (CT 36-37). Both telephones were listed to Frank Garber, at 2395 New Jersey Avenue, San Jose (CT 28-29, 36).

In May 1966, computer print-outs showed 108 long distance information calls from number 266-2737, listed to subscriber Vince Colombo at 1898 Meridian Road, San Jose (RT 169). Subsequently, Colombo transferred his telephone service to number 252-4608, at 19400 Sorenson Drive, Apartment 209, Cupertino (RT 170). In September, October, and November 1966, 75 long distance information calls were placed from Colombo's new number (RT 170-71). The manager of both the Meridian Road and Sorenson Drive apartments identified Frank Garber as Vince Colombo. The apartments were rented by George Rivera, also known as Charles Teran (CT 4-8, 63).

Computer print-outs for October and November 1966, showed 345 long distance information calls from number 243-3526 and 14 such calls from number 243-4229, some of long duration (CT 38-39). Both telephones were located in the home of Benny Noto, at 315 Carriage Drive, Santa Clara (CT 37).

The recited print-out data indicated either equipment malfunctions or the use on petitioners' telephone line of illegal "blue box" devices. Telephone company personnel first ascertained that their lines were in working order (CT 40; RT 203-04). The company then concluded that "blue boxes" were in use on petitioners' lines (RT 203).

A "blue box," or a multi-frequency signal generator, is an acoustical device used to deceive the automatic billing equipment employed by telephone companies since the adoption of the direct dialing system. Using a "blue box" one may call free of charge virtu-

ally any number in the United States and Canada (CT 19).

The device, which may be held in one hand, resembles a modern miniature telephone operator's switchboard; it is linked to the subscriber's telephone (CT 17). The user dials an area code, then the universal long distance information number on his telephone. This is recorded by company equipment as a toll-free call. By activating the release button on his "blue box" the user then indicates to the telephone toll circuit that he has terminated his call; in fact, he has retained control of the trunk line. After pushing the start button, the user next depresses numbered buttons on the "blue box" to dial the number of his choice. This portion of the call, save for duration, is unrecorded and, therefore, free (CT 17-20). Once a person has cut into the trunk line he can make successively an unlimited number of calls to different numbers (RT 86-87; CT 20).

The telephone company is required by federal law to maintain records on all long distance calls so that excise taxes may properly be levied (CT 42). In order to prepare bills, and to acquire positive demonstrative evidence of illicit "blue box" use, it is necessary to monitor the telephone lines of suspected "blue box" users. However, Security Agent Alex testified, company officials realize that "we didn't have the correct equipment to actually go on the line and still protect the customer's privacy in case we were wrong" (CT 40). The company, therefore, developed special equipment which would monitor and record

only outgoing calls illegally placed (CT 40). Monitoring equipment was activated upon the sound of the 2,600 cycle tone generated by the "blue box" (CT 43).

Commencing October 24, 1966, this new monitoring equipment was installed on Garber's line (CT 42; RT 189). Only outgoing calls placed with the "blue box" were monitored (RT 190). Monitoring ceased on November 2, 1966 (RT 192). During the 28 hours of monitoring, some 65 minutes were recorded (RT 191-92, 206-07).

Having completed its investigation, the telephone company on November 29, 1966, first approached law enforcement officials (RT 36, 193-94). In this initial encounter the company disclosed that they had evidence of toll fraud within the jurisdiction of the District Attorney of Santa Clara County. Apparently, appellants were identified as suspects (RT 41). Company representatives did not reveal the existence or contents of recorded calls (RT 61-62, 205-06).

On November 30, 1966, in response to the written demand of the District Attorney (RT 57), the company presented to the prosecutor tape recordings of calls placed with a "blue box" on Garber's line (RT 44). Certain of these tapes were placed in evidence. Concededly, they constitute evidence "truly illustrative of bookmaking activities" (RT 88-89). Petition, p. 6.

On December 11, 1966, warrants were procured for the search of the Noto premises at 315 Carriage Drive, Santa Clara, and for the Garber residence at 2395 New Jersey Avenue, San Jose (RT 164-65, 170-71).

Telephone company print-outs disclosed that a "blue box" call was placed from Teran's Sorenson Drive apartment between 10:00 and 11:00 a.m. each Monday (RT 171). On Monday, December 12, at 8:00 a.m., company monitoring equipment was placed on Teran's line for the first time (RT 173). A call was placed at approximately 10:15 a.m. (RT 174). George Alex, monitoring the call, detected the familiar "blue box" tone (RT 183-84). The call was not recorded because recording equipment had not yet been fully set up (RT 183-84). The "blue box" was used three times; apparently the device malfunctioned for no calls were completed (RT 186-88). By prearrangement, Alex advised the District Attorney that a multi-frequency signal generator was being used at Teran's address (RT 187).

Police placed Teran's apartment under surveillance on the evening of December 11 (RT 27). According to plan, when the "blue box" device was being used Alex would so inform the authorities. Detective Oria Curtis and Investigator Philip Morris would then enter the apartment and arrest the user (RT 10, 12). On the morning of December 12, they received the anticipated information over the police radio that the "blue box" was in use (RT 13, 99-102).

Curtis, accompanied by several officers, proceeded a short distance to Teran's apartment and knocked on the front door. Teran appeared at a window next to the front door and pulled aside the drapes. Speaking loudly, Curtis said, "May I see you? Open the door." (RT 15). Teran replied, "Who are you?" Curtis

responded, "Open the door and I'll introduce myself." Teran repeated his inquiry. Curtis then placed his identification card before the window so that Teran could read, in ½ inch bright blue letters, "Sheriff's Office" (RT 17). Teran scrutinized the card, said "just a minute," and disappeared. Twenty-five seconds later Curtis knocked again. Hearing a commotion within, he forced entry (RT 19). Morris then entered through the rear door (RT 23). Curtis arrested Teran and Garber in the living room (RT 20). A search of the apartment uncovered two "blue boxes" (RT 108-10), and evidence of bookmaking including sports journals, adding machines, business records, and $2,970 in cash lying on a table (RT 105-15).[2] At 10:20 a.m. on December 12, Santa Clara Police Officer Macer executed the warrant authorizing a search of the Noto premises (RT 71-72). Officer Macer rang the doorbell and was admitted by Noto (RT 73-74). Bookmaking paraphernalia and racing journals were discovered (RT 74-81). Officers found a "blue box" secreted in a ceiling light fixture (RT 81-82). At 10:16 a.m. on December 12, San Jose police officers executed the warrant authorizing a search of the Garber premises (CT 89; RT 64). Evidence uncovered during this search was ruled inadmissible by the Court of Appeal on the ground that by failing to give notice of their authority prior to entry, the officers did not comply with state law, Penal Code section 1531. Petition, Appendix 1, xvi.

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[2]There was testimony by Robert Mitchell that he placed wagers with Garber between May and September of 1966 (CT 64). Once, Garber collected a gambling debt from Mitchell accompanied by Teran (CT 65-67).

ARGUMENT

I

THE FEDERAL COMMUNICATIONS ACT, 47 U.S.C. § 605, DOES NOT APPLY IN THIS CASE AND DOES NOT RENDER INADMISSIBLE AGAINST PETITIONERS EVIDENCE OBTAINED BY TELEPHONE COMPANY MONITORING.

Petitioners urge the Court to accept this state case in order to resolve what they characterize as a conflict among federal appellate courts as to the proper interpretation of section 605 of the Communications Act. This Court recently declined to entertain precisely this question in denying certiorari in *Hanna v. United States,* 404 F.2d 405 (5th Cir. 1968), *cert. denied* 394 U.S. 1015 (1969).

The Court cannot reach in our case the question which it refused to pass upon in *Hanna.* "[A]t the time of the alleged violation," the Court of Appeal held, section 605 "had no application to the admission of evidence in state courts." 275 A.C.A. 127, 135; Petition, Appendix 1, viii. As the Court of Appeal explained quite succinctly:

> "In *Schwartz v. Texas* (1952) 344 U.S. 199, 201 . . ., it was held that communications intercepted in violation of 47 U.S.C.A. section 605 were admissible in a state court. (See *People v. Channell* (1951) 107 Cal.App.2d 192, 198-199 [236 P.2d 654].) The *Schwartz* case was overruled in *Lee v. Florida* (1968) 392 U.S. 378 . . ., which held such evidence to be inadmissible in state court trials. The basis of the holding in *Lee* was that *Mapp v. Ohio* (1961) 367 U.S. 643 . . . had overruled *Wolf v. Colorado* (1949) 338 U.S. 25 . . . upon which *Schwartz* had relied for the holding

> that state courts 'were free to decide for themselves whether to condone violations of federal law by accepting the products of such violations as evidence.' . . . However, in *Fuller v. Alaska* (1968) 393 U.S. 80 . . ., the court held that *Lee* was to be applied only to trials in which such evidence is sought to be introduced after June 17, 1968, the date of the *Lee* decision. In the present case the evidence in question was introduced prior to the decision in *Lee*." 275 A.C.A. 135-36; Petition, Appendix 1, viii-ix.

Since the Court's prior decisions hold that section 605 did not govern the admissibility of wiretap evidence in these state court proceedings, this case offers no opportunity for construing the federal statute.

Petitioners characterize interpretations placed upon section 605 by the United States Courts of Appeals for the Fifth and Tenth Circuits as "diametrically conflicting" with the construction of the statute by the Court of Appeals for the Ninth Circuit. Petition, 12. We perceive no irreconcilable conflict.

In *United States v. Sugden*, 226 F.2d 281, 285 (9th Cir. 1955), *aff'd per curiam* 351 U.S. 916 (1956), the Ninth Circuit held that where the use of a communication facility is illegal the right of privacy does not exist and the intercepted matter may be divulged. "The protections of the [Communications] Act were never intended for, nor do they cover, . . . communications which are themselves illegal." *Casey v. United States*, 191 F.2d 1, 4 (9th Cir. 1951), *rev'd on other grounds* 343 U.S. 808 (1952).

In *Bubis v. United States,* 384 F.2d 643 (9th Cir. 1967), the Ninth Circuit reiterated:

> "We do not believe that in the enactment of Section 605 . . . Congress intended to deprive communications systems of their fundamental right to take reasonable measures to protect themselves and their properties against the illegal acts of a trespasser." *Id.* at 648.

Hanna v. United States, said by petitioners to be in conflict with *Bubis,* is in accord on this fundamental proposition and, indeed, relies upon the Ninth Circuit's opinion in *Sugden.* 404 F.2d at 407.

Citing *Brandon v. United States,* 382 F.2d 607 (10th Cir. 1967), the other decision described by petitioners as irreconcilable with *Bubis,* the Ninth Circuit held in *Bubis* that a reasonably apparent illegal user of a telecommunication line must be held to consent to monitoring to the extent reasonably necessary for investigation. 384 F.2d at 648.

Brandon, Hanna, and *Bubis* are in essential harmony: section 605 does not deny a utility the right to employ reasonable measures to protect itself. *Bubis* excluded wiretap evidence admitted in *Hanna* and *Brandon* because in the Ninth Circuit case the utility's measures far exceeded what was reasonably necessary for its self-protection. In *Bubis,* the telephone company monitored all incoming and outgoing calls for three months. Certainly Bubis was not trespassing on telephone company lines when making legal outgoing calls or when receiving incoming calls.

In our case the telephone company, perhaps mindful of *Bubis,* delayed monitoring for a considerable period so that equipment could be developed which would not overhear legitimate calls. This commendable caution enabled the company to monitor *only* outgoing calls illicitly placed. No incoming calls were monitored; no legally placed outgoing calls were monitored. Garber's telephone was monitored during one week only. Teran's telephone was monitored but a few hours. We cannot comprehend petitioners' claim that "the facts in *Bubis* form a counterpart" to the circumstances of their case. Petition, 12. The judgment below appears to be as consistent with *Bubis* as with *Brandon* and *Hanna.*[3]

II

EVIDENCE DISCOVERED DURING THE SEARCH OF PETITIONER TERAN'S APARTMENT IS NOT MADE INADMISSIBLE BY THE FOURTH ADMENDMENT.

Petitioners contend that evidence uncovered by the search of Teran's apartment was obtained in violation of the Fourth Amendment. Apparently, they advance three discrete grounds: police lacked probable cause to believe that a felony was being committed in the Teran apartment when they sought entry; notwithstanding probable cause, the search incidental to the arrest of Teran and Garber was unconstitutional for

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[3]Petitioners invoke the authority of *Katz v. United States,* 389 U.S. 347 (1967). Petition, 14. *Katz* is inapplicable because the electronic surveillance here was conducted more than a year before that decision, *Desist v. United States,* 394 U.S. 244 (1969), and because the search was by a private party, *Burdeau v. McDowell,* 256 U.S. 465 (1921).

want of a search warrant; the scope of the incidental search exceeded the permissible bounds set forth in *Chimel v. California*, 395 U.S. 752 (1969). The Court of Appeal expressly rejected each of these contentions as without merit.

A. Police had probable cause to believe a felony was being committed within Teran's apartment.

A California peace officer may arrest a person without a warrant whenever he has reasonable cause to believe that the person has committed a felony or has committed an offense in his presence. Cal. Pen. Code §836. Reasonable or probable cause exists when facts known to the officer would lead a man of ordinary care and prudence to believe that the person arrested has committed an offense. *People v. Schader*, 62 Cal.2d 716, 722 (1965); *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

The Court of Appeal correctly designated Alex as a citizen-informant and properly concluded that "the information received from the telephone company security officer concerning the violation of the wiretapping law provided sufficient probable cause to support an arrest." 275 A.C.A. at 137; Petition, Appendix 1, xi. The arresting officer, Curtis, had participated in meetings with telephone company personnel during which the Teran arrest was planned (RT 8-10). Alex also took part in these meetings (RT 193). Curtis learned then that a "blue box" was in use in Teran's apartment (RT 9). In fact, Curtis attended a strategy meeting only three hours prior to the arrest (RT 11). Because the officer was thus acquainted with Alex he could evaluate the reliability of information supplied

by the security agent. Curtis and Morris, who also participated in the arrest, knew that on December 12 information provided by the telephone company would be relayed over the police communications network (RT 13).

Given the participation of the arresting officer in events leading to petitioners' arrest, Curtis' reliance upon information from a source known to him cannot be deemed unreasonable. Whether Alex correctly determined that the Teran "blue box" was used on December 12, has no bearing upon the reasonableness of the officers' reliance on his expert opinion. Aside from being irrelevant, petitioners' suggestion that no "blue box" call was placed on December 12 is refuted by the record. Alex said the device was used three times. The absence of a print-out reflecting these calls may be attributed to the fact that the calls were not completed because the "blue box" malfunctioned (RT 183-88). The illicit uncompleted calls were not recorded as Alex had not fully installed his recording equipment before they were placed (RT 183-84).

B. The search was not unreasonable because police failed to procure a search warrant.

In *United States v. Rabinowitz,* 339 U.S. 56 (1950), this Court held that a warrant, though readily obtainable, was not a condition precedent to a reasonable search. *Id.* at 64.

> "To the extent that *Trupiano v. United States,* 334 U.S. 699, requires a search warrant solely upon the basis of the practicability of procuring it . . . that case is overruled." *United States v. Rabinowitz, supra,* 66.

The *Rabinowitz* principle was reaffirmed in *Ker v. California*, 374 U.S. 23, 41 (1963) (opinion of Mr. Justice Clark):

> "The practicability of obtaining a warrant is not the controlling factor when a search is sought to be justified as incident to arrest . . . ."

After *Ker*, some voiced doubt as to the continued vitality of this aspect of *Rabinowitz*. This Court responded in *Cooper v. California*, 386 U.S. 58, 62 (1967):

> "It is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.' *United States v. Rabinowitz*, 339 U.S. 56, 66."

Chimel v. California, *supra*, overruled *Rabinowitz* only on the question of the constitutionally permissible scope of searches incident to arrest. *Chimel* does not make procuring an available warrant the condition precedent to arrest or to an incidental search.

C. Chimel v. California is inapplicable.

For the reasons articulated by the Court in *Desist v. United States*, *supra*, limiting the rule of *Katz v. United States*, *supra*, to prospective application, California courts have similarly limited the new rule announced in *Chimel v. California*. The search of the Teran apartment and, indeed, petitioners' convictions, antedate the decision in *Chimel*. Unless the Court should decline to apply the limiting rationale of *Desist* to *Chimel* in *Hill v. California*, No. 730, October 1969 Term, *Chimel* is inapplicable here.

CONCLUSION

For the stated reasons we respectfully urge this Court to deny the petition for a writ of certiorari.

Dated, April 20, 1970.

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